SUPREME COURT, U. S.

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No. 755

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

JOSEPH L. MITCHELL d/b/a LA SALLE COUNTY LIVESTOCK MARKETING CENTER,

Petitioner,

vs.

ORVILLE L. FREEMAN, Secretary of Agriculture,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Joseph L. Mitchell, d/b/a LaSalle County Livestock, Marketing Center, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause in *Joseph L. Mitchell d/b/a LaSalle County Livestock Marketing Center, Petitioner* v. *Orville L. Freeman, Secretary of Agriculture, Respondent,* No. 13658, on October 22nd, 1962, which affirmed the decision of the Judicial Officer for the Secretary of Agriculture entered on February 13th, 1962.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is appended hereto as "Appendix A". It has not yet been printed in the official reports.

JURISDICTIONAL STATEMENT.

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Judicial Officer of the Secretary of Agriculture were filed and entered on October 22nd, 1962 (Appendices A and B attached hereto). The judgment became final on that date. On December 18th, 1962 Mr. Justice Clark entered an order herein extending the time to petition this Court for a writ of certiorari to January 20th, 1963, assuming but not deciding authority to grant enlargement of time.

The jurisdiction of this Court is invoked pursuant to Sec. 194 (H) Title 7, U. S. Code, providing that such decision of the Court of Appeals is subject to review by this court upon Certiorari.

QUESTIONS PRESENTED.

(1) This Court has held that administrative decisions of executive officers must be supported by substantial evidence based on the whole record. The Circuit Court of Appeals for the Seventh Circuit actually applied the test of determining whether there was any evidence to support the decision of the Judicial Officer for the Secretary of Agriculture. His decision is not supported by substantial evidence based on the whole record.

(2) At the Hearing of this cause before the Hearing Officer for the Secretary of Agriculture improper and illegal evidence of tests and experiments in hauling other cattle on other occasions to determine how much weight they would lose when the conditions and circumstances under which the tests were conducted were not similar to the circumstances prevailing at the time of the occurrence in question was admitted evidence and the decisions of the Hearing Officer and of the Judicial Officer for the Secretary of Agriculture are based on this illegal evidence.

STATUTES AND AUTHORITIES RELIED UPON.

I.

The Decision of the Judicial Officer for the Secretary of Agriculture is not supported by substantial evidence based on the whole record.

(a) The administrative procedure act requires the United States Court of Appeals and this Court to set aside administrative action of the Secretary of Agriculture if it is unsupported by substantial evidence considering the whole record consisting of the evidence contrary as well as in favor of his action.

5 U.S.C.A. Sec. 1009 (e).

95 L. ed. Ann. 473 at page 474.

Universal Camera Corp. v. *National Labor Relations Board* (1951), 340 U.S. 474, 95 L. ed. 456, 71 S. Ct. 456.

National Labor Relations Board v. *Pittsburgh S.S. Co.*, (1951) 340 U.S. 498, 95 L. ed. 479, 71 S.Ct. 453.

II.

The Hearing Officer erred in admitting evidence, tests and experiments of hauling other cattle on other occasions to determine how much weight they would lose when the conditions and circumstances under which the tests were conducted were not similar to the circumstances prevailing at the time of the occurrence.

(a) Evidence of tests, or experiments, are not admissible unless it is proved that the circumstances under which tests are performed are similar to circumstances prevailing at the time of the occurrence.

32 C.J.S. "Evidence", Sec. 590, page 442.

New York Life Insurance Company v. *Alman*, C.C.A. Ala. 22 F. 2d 98. Cert. denied, 48 S. Ct. 433, 277 U.S. 586, 72 L. ed. 1000.

Thomas v. *Buchanan*, 277 Ill. App. 293.

R. A. Watson Orchards v. *New York C. & St. Louis Ry. Co.*, 250 Ill. App. 22.

Johnson v. *Gustafson*, 233 Ill. App. 216.

(b) The burden is on the one offering evidence of tests or experiments to prove that the circumstances are the same as those prevailing at the time of the occurrence.

32 C.J.S. "Evidence", Sec. 590, page 443.

STATEMENT OF THE CASE.

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C.A. 181 *et seq.*) instituted by a Complaint filed December 22nd, 1960 by the United States Department of Agriculture. The Complaint charges petitioner Joseph L. Mitchell, the operator of a posted stockyard under the provisions of the act with falsely weighing cattle on the occasion of three sales on September 28th, 1960, October 12th, 1960 and October 13th, 1960 (P.A. 6). After a Hearing before the Hearing Examiner for the Department of Agriculture, he entered an Order finding petitioner guilty of falsely weighing the cattle on each of the three occasions (P.A. 148-159). On Appeal before the Judicial Officer for the Secretary of Agriculture, he entered an order on February 13th, 1962 finding petitioner not guilty of falsely weighing the cattle on September 28th, 1960, but finding him guilty of falsely weighing the cattle on the occasions of October 12th and October 13th, 1960 (P.A. 160-175). He Ordered that petitioner be suspended as a registrant under the Act for a period of 90 days and Ordered him to cease and desist from falsely and incorrectly weighing livestock and causing false and incorrect entries in his accounts and records (P.A. 175). The Court of Appeals affirmed the Order. The issue in this case is whether Joseph L. Mitchell wilfully and intentionally weighed cattle falsely at amounts substantially greater than their actual weights in connection with three sales made on September 28th, 1960, October 12th, 1960 and October 13th, 1960. The sales in question were made to Fred Bend Sr. and Donald Bend, his son, who the representatives of the Department of Agriculture

had induced to go to Mr. Mitchell's place of business and make the purchases for the purpose of attempting to obtain evidence of misconduct in weighing the cattle (P.A. 32, 33).

The Court of Appeals is given jurisdiction to set aside and modify the Order of the Secretary of Agriculture by Sec. 194 of the Act (7 U.S.C.A. Sec. 194) and by Sec. 2 of the Administrative Procedure Act (64 Stat. 1129, 5 U.S.C.A. Sec. 1032). This Court has jurisdiction to review the decision of the Court of Appeals (7 U.S.C.A. Sec. 194).

The United States Court of Appeals for the Seventh Circuit was the proper venue for this proceeding for the reason that the LaSalle County Livestock Marketing Center, operated by the petitioner Joseph L. Mitchell is located in LaSalle County, Illinois and the sales of livestock complained of took place at this marketing center in LaSalle County, Illinois.

The petitioner in his Answer denies the charges made against him and sets forth in detail an explanation that the difference between the weights shown on the weight tickets issued by him at the time of these three sales and the weights of the cattle as determined by the representatives of the Department of Agriculture at a later time was due to shrinkage of the cattle (P.A. 7).

Joseph L. Mitchell is the operator of a small livestock marketing center which he operates under the name of LaSalle County Livestock Marketing Center, located in the Northern part of LaSalle County, Illinois. He is registered under the Packers and Stockyards Act.

In September 1960 the Department of Agriculture made an arrangement with Fred Bend Sr. and Donald Bend, his son, by which the Bends were to go to the Mitchell livestock center and purchase approximately 20 head of cattle

of the weight of about 750 pounds each for the purpose of testing the weighing of the cattle by Mr. Mitchell (P.A. 10-13). After the purchase, the cattle were to be hauled to another scales some 11 to 14 miles away and reweighed (P.A. 14). The Bends could either keep the cattle at the lowest weight or turn them over to the Department of Agriculture and be reimbursed for their cost (P.A. 32, 33). Pursuant to this arrangement, Fred Bend Sr., Donald Bend and Fred Bend Jr. went to Mr. Mitchell's LaSalle County Livestock Marketing Center on three occasions, September 28th, October 12th and October 13th, 1960 (P.A. 45). On each of these three occasions they purchased 20 steers at Mr. Mitchell's livestock center. On September 28th, the steers purchased were weighed by Mr. Joseph L. Mitchell at 15,500 pounds (P.A. 165). They were loaded in the Government truck and hauled 14½ miles to a marketing association where they were re-weighed about an hour and a half after the original weighing, at which time they weighed 14,980 pounds (P.A. 165). On October 12th, the 20 head of cattle purchased by the Bends at Mr. Mitchell's livestock center weighed 15,025 pounds (P.A. 165). They were hauled to the marketing association by a different route, approximately 11 miles, and again weighed about three-quarters of an hour later at which time they weighed 14,190 pounds (P.A. 165). The 20 head of cattle purchased on October 13th weighed 13,945 pounds at Mr. Mitchell's livestock center. They were loaded and hauled to the marketing association and re-weighed about three-quarters of an hour later at which time they weighed 13,165 pounds (P.A. 165). The difference in weights on each of these occasions was 520 pounds or 3.35%. On September 28th, 835 pounds or 5.56% on October 12th and 780 pounds or 5.59% on October 13th for the 20 head of cattle (P.A. 165).

All of these cattle had been shipped in from Montana (P.A. 76). They had been purchased by Joseph Mitchell on what is termed "Western Weights". That means that they are weighed before shipment in Montana, and the owner is paid on the basis of the Montana weights regardless of how much they shrink en route to Mitchell's place of business (P.A. 76). The evidence shows that in shipping cattle from Montana to Illinois, a distance of some 1500 miles, the cattle normally shrink about 10% (P.A. 76).

The Bends had been instructed by Mr. Hopper of the United States Department of Agriculture, that they were not to purchase the cattle from Mr. Mitchell on the basis of western weights, but rather to insist on purchasing on local weights (P.A. 11). On each of the three occasions, when the Bends went to Mr. Mitchell to purchase the cattle, the steers arrived at the Mitchell place of business 36 to 48 hours before the sale and the Bends made the purchase at least a half a day before taking delivery (P.A. 33, 77). On each occasion Mr. Mitchell made the sale but told the Bends that they would not be ready for delivery until they had been filled. The Bends understood by this that Mr. Mitchell was going to get as much water or weight on the cattle before the time of weighing and delivery as possible (P.A. 35, 77). The cattle had been shipped in from the West and had lost approximately 10% of their weight in shipment (P.A. 76). Mr. Mitchell expressly told the Bends that he would not deliver the cattle to the Bends until he was able to put as much of this weight back as possible. The Bends agreed to this arrangement (P.A. 35).

On each of the occasions in question the cattle arrived from the West at Mr. Mitchell's place of business about 36 to 48 hours before the time they were delivered to the

Bends (P.A. 77). The quick fill method employed by Mr. Mitchell was that he gave the cattle hay for about 8 hours after their arrival. Then he gave them one drink of water and thereafter kept them off water for about 36 hours. During this period they were given hay all the time for about 3 hours and then turned back on water the morning of the sale about 9 a.m. They were given water slowly with 10 cattle in the pen at a time (P.A. 77). By this method most of the loss of weight of the cattle in shipment from the West was put back on them.

The Bends were expressly instructed by Mr. Gilbert Hopper of the Department of Agriculture, who was in charge of investigation, not to watch the weighing of the cattle by Joseph Mitchell (P.A. 106).

The scale at the Mitchell livestock center was located in plain view for anyone to watch the weighing of the cattle. Anyone could easily tell if there was any manipulation of the scales (P.A. 64-65). As the cattle were weighed, the Mitchell scales printed a weight ticket showing the weight of the cattle. The only way that this weight could be wrong would be if there was a manual manipulation of the scales in the act of balancing them or otherwise (P.A. 69-70). This could easily have been observed by anyone in the vicinity (P.A. 64, 69).

The petitioner, Mr. Joseph L. Mitchell, testified that on each of these three occasions he honestly and correctly weighed the cattle (P.A. 78).

Mr. R. A. Hahnert, scales and weight expert for the Department of Agriculture, testified that he was at the Mitchell livestock center on the occasion of the purchase of these cattle. He testified that the scales at the Mitchell livestock center were so located that he could have gotten

to the side and rear of the scales, a distance of 30 feet away, where Mr. Mitchell could not have seen him, and he could have seen Mr. Mitchell balancing the scales in the weighing operation (P.A. 64-66). If he had done this he could have determined whether the scales were being properly balanced by Mr. Mitchell. He could also have seen any manual manipulation of the scale by Mr. Mitchell (P.A. 70). He did not do so on any of the three occasions. His reason for not doing so was because Mr. Hopper of the Department of Agriculture had instructed him not to watch the weighing operation (P.A. 66). The Bends also purposely avoided watching Mr. Mitchell in weighing the cattle (P.A. 106).

On October 13th, after the last of the three groups of cattle were taken and re-weighed at the livestock marketing association some 11 to 15 miles from Mr. Mitchell's livestock center, they were again returned by the representatives of the Department of Agriculture to Mr. Mitchell's livestock center (P.A. 57). On reweighing the scales showed an additional shrink of 100 lbs. or 5 lbs. per head. Mr. Hahnert, the scales and weight expert for the Department of Agriculture, again checked Mr. Mitchell's scales. He found them to be completely accurate except for a very small variance which was of no consequence (P.A. 67).

Many witnesses testified on behalf of Joseph Mitchell concerning the shrinkage of cattle that have been water filled. Mr. Sam Gourley of Cornell, Illinois, testified that his father and grandfather were both cattle dealers. He personally dealt with cattle for close to 22 years. He has had experience in observing the filling of cattle (P.A. 92). The amount of weight that can be put back on cattle by this quick fill method depends on the type of cattle, quality of cattle and where the cattle came from (P.A. 92). If the

cattle are quiet they will fill quite a bit. If they are nervous they fill slowly (P.A. 92). The witness has observed cattle fill 70 pounds (P.A. 92). He has had cattle shrink 100 pounds in shipping them from the Pontiac Sale Barn in Pontiac, Illinois to Chicago (P.A. 92). Merely taking cattle off the scales and loading them would sometimes cause a shrink as high as 10 pounds. Cattle will often shrink as much on a short haul as on a long haul (P.A. 92). It depends on the amount of water put into them (P.A. 92). The witness was of the opinion that the difference in weights of the cattle sold by Mr. Mitchell to the Bends could be explained by the shrink in the cattle (P.A. 92).

Witness John O'Donnell testified that he has fed cattle for 40 years and during that time he has had occasion to observe the operation known as the quick fill (P.A. 94). He figures on losing 30 to 50 pounds per head in shipping fat cattle from his farm at Ottawa, Illinois to Chicago, Illinois. That is after they are fed and watered in Chicago (P.A. 94). Feeder cattle will shrink more than fat cattle (P.A. 94). On the quick fill method the cattle will lose half of the fill that is put into them (P.A. 94). From 60 to 70 pounds can be put on cattle by the quick fill method. In the opinion of the witness they can lose one-half of this or about 35 pounds in being hauled for 40 minutes (P.A. 94-95). After Mr. O'Donnell listened to the testimony presented in this case concerning the controlled tests conducted by the Department of Agriculture, he was recalled to the stand and testified that in his opinion there was no similarity before the controlled tests and the actual conditions of the sale made by Mr. Mitchell to the Bends. In his opinion it was not a fair comparison (P.A. 123). In his opinion the loss of weight that occurred in this case can well be explained by the shrinkage of the cattle (P.A. 94).

Witness John Krippel testified that he is an employee of the Hebron Packing Company. He is familiar with the quick fill method of putting weight on cattle (P.A. 95). It is possible to put from 20 to 100 pounds on the weight of cattle by the quick fill method (P.A. 95). Where the quick fill method has been employed then in a short haul they can lose this fill in the first 25 minutes (P.A. 95). The shrinkage of the cattle in the instant case was not at all excessive (P.A. 96).

Witness Charles Melvin testified that he feeds from 2,000 to 3,000 head of Western feeder cattle a year (P.A. 96). He has had occasion to observe the shrinkage of cattle. On shipping cattle 1400 to 1500 miles from the West they will shrink 8% to 15% (P.A. 96). He has purchased steers at Ogallala, Nebraska weighing 800 pounds that shrank 120 pounds per head on rail shipment (P.A. 96). In Presho, S. D. he saw cattle weighing 704 pounds per head purchased at 12:00, Noon. He went out to lunch and at 1:30 he came back to the sale ring and the cattle had shrunk 20 pounds per head. There is a wide variation in grasses. The type of grasses that cattle eat cause a wide variation of shrink (P.A. 96, 97).

Witness Thomas Corcoran is a farmer and cattle raiser located near Earlville, Illinois. On one occasion he hauled 8 head of cattle to Earlville and had them weighed on the Earlville Farmers Elevator scales. They were weighed there by a regular sealer and he was given weight tickets (P.A. 98). He then hauled the cattle a distance of 20 miles to Mr. Mitchell's place of business and they were reweighed. On being reweighed they had lost 240 pounds, or 30 pounds per head (P.A. 98). Mr. Mitchell put them through the sale ring and sold them and then reweighed the cattle and they had lost an additional 115 pounds (P.A. 85, 98).

Mr. Corcoran was of the opinion that the loss of weight involved in this case can well be explained by shrinkage of the cattle.

Arthur Egland is a farmer residing near Earlville who buys feeder cattle. He had an experience of purchasing cattle shipped in from the West from Mulland, Nebraska that lost 10% in weight in shipment (P.A. 100). He is familiar with the quick fill method of filling cattle. Cattle that have been grazed on long grass have what is called a well-sprung-rib and have a bigger capacity and they will fill in and empty more and fill back again more than other cattle. Cattle raised on short grass will not shrink as much. The territory around Geyser, Montana and Drummond, Montana, where the cattle purchased by Mr. Mitchell came from is long grass country (P.A. 100). This witness was of the opinion that the loss in weight in this case could well be explained by shrinkage.

Witness Charles Conlan is a farmer residing near Sycamore, Illinois. He has been engaged in farming for 22 years. He has had the opportunity of observing shrinkage in cattle when he ships them to Chicago. A trip from his farm to Chicago is approximately 60 miles and takes about 2 hours. The cattle will lose approximately 5% on this trip after having had water and hay in Chicago (P.A. 99). Grass fed cattle will shrink more than feeder cattle (P.A. 99). In his opinion the loss of weight involved in the cattle in this case could be explained by shrinkage (P.A. 99).

The Department of Agriculture produced 3 or 4 witnesses at the Hearing engaged in the cattle business who did not think that cattle would shrink as much as occurred in this case. It also produced a veterinarian, Dr. Jewell Schlapp. He testified that the pouch, or stomach, of a cow

holds approximately 30 gallons or 240 pounds of water. (P.A. 113). It was his opinion that if a steer is given an opportunity to take on as much water as it wants in a 3 or 4 hour period, urination of more than a gallon of such water would be excessive if the animal was not handled. If the animal was handled by hauling, for example, the steer could lose in his opinion a maximum of 2 gallons of water. (P.A. 114, 115). He testified that animals suffer their greatest weight loss in the first hour. It was his opinion that 20 lbs. per head would be the most cattle would lose by shrink in a period of an hour and a half. (P.A. 114, 116). He further testified that he had no experience with the fill method of putting weight on cattle, and had never actually witnessed it or the amount of shrink after it.

Over the objection of the attorneys for petitioner Joseph L. Mitchell, the Department of Agriculture was permitted to put in evidence six tests it made to attempt to determine how much weight cattle would lose in hauling. On September 29th, 1960, the representatives of the Department of Agriculture purchased from Henry Steele & Company, a cattle dealer of Montgomery, Illinois, 20 head of cattle. They loaded them in a truck and hauled them a distance of 11 to 16 miles and re-weighed them. The original weight was 14,725 pounds and the re-weighing was 14,580 pounds. A difference of 145 pounds (P.A. 166). On October 5th, representatives of the Department of Agriculture purchased from Western Cattle Company, a cattle dealer of Mendota, Illinois, 20 head of cattle weighing 14,640 pounds. They loaded the cattle and hauled them 11 to 16 miles and then re-weighed the cattle. At the time of re-weighing the weight was 14,540 pounds, or 100 pounds less than the original weighing. (P.A. 166). On November 20th, 1960, the Department of Agriculture purchased from Henry

Steele and Company at Montgomery, Illinois 20 head of cattle weighing 14,445 pounds. After hauling them 11 to 15 miles they were re-weighed and weighed 14,265 pounds, a difference of 180 pounds (P.A. 166). On this same date, November 20th, 1960, the Department of Agriculture obtained another group of 20 head of cattle from Henry Steele & Co. weighing 13,925 pounds. After hauling about 15 miles they weighed 13,830 pounds, a difference of 95 pounds. (P.A. 166). On December 6th, 1960 the Department of Agriculture obtained 20 head of cattle from Western Cattle Company weighing 12,670 pounds. After hauling them about 15 miles they weighed 12,630 pounds, or 40 pounds less than the original weight. (P.A. 166). On December 9th, 1960, the Department of Agriculture obtained 20 head of cattle from Chicago Producers Commission Association, cattle dealers at Montgomery, Illinois, weighing 13,980 pounds. After hauling them some 15 miles, they weighed 13,930 pounds, a difference of 50 pounds. (P.A. 166). The evidence of these tests was objected to by petitioner Joseph L. Mitchell because it was not shown that the conditions were similar to the conditions of the three purchases of cattle from the Joseph L. Mitchell Livestock center. (P.A. 73, 74) In none of the test cases was there any attempt made to fill the cattle as much as possible, or to add weight to them. The temperature at the time of the sales at the Mitchell livestock center on October 12th and October 13th, was 80 to 81 degrees above zero (P.A. 86-87). At the time of the tests in November and December the temperature was about 20 degrees above zero. (P.A. 105). There is no showing how much weight the cattle used in the test lost in being shipped in from the West, how long they were here before the test, or how much weight had been regained after they arrived in Illinois and before the tests were conducted.

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Judicial Officer for the Secretary of Agriculture is not supported by substantial evidence based on the whole record.

(a) The administrative procedure act requires the United States Court of Appeals and this Court to set aside administrative action of the Secretary of Agriculture if it is unsupported by substantial evidence considering the whole record consisting of the evidence contrary as well as in favor of his action.

The first contention of the petitioner, Joseph L. Mitchell is that the finding and decision made by the Judicial Officer for the Secretary of Agriculture, that Joseph L. Mitchell falsely and intentionally misweighed the cattle in question is not supported by substantial evidence based on the whole record. The law is now settled that when the United States Court of Appeals is given the duty by statute to review the decision of an Administrative Agency, it does not merely consider the record and the evidence to determine whether there is any evidence to support the decision of the Administrative Agency. On the contrary, it reviews the whole record. It considers the evidence against, as well as the evidence in favor of, the decision of the Administrative Agency. After considering the whole record, if the court is not convinced that the decision of the Administrative Agency is supported by substantial evidence, then the Administrative Agency should be reversed. The Court of Appeals in this case in effect applied the rule that the decision of the Secretary of Agriculture would be affirmed if there was any evidence in the record to support it. The Secretary of Agriculture based this decision largely on improper and illegal evidence of tests

and experiments. The Court of Appeals affirmed the judgment on the basis of other evidence. This is contrary to the holdings of the United States Supreme Court.

In 5 U.S.C.A., Sec. 1009 (e), it is provided as follows:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be
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> (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute;
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> In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The United States Supreme Court has interpreted this section of the statute in the case of *Universal Camera Corporation* v. *National Labor Relations Board* (1951), 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456. The court there held that in determining whether an order of the board is supported by substantial evidence the court should take into account whatever in the whole record fairly detracts from the weight of the evidence and that the court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. Mr. Justice Frank-

furter wrote the opinion of the court and in the opinion he states,

> "So far as the history of this movement for enlarged review reveals, the phrase 'upon the whole record' makes its first appearance in this recommendation of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act.
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> "The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications, or plainly incredible evidence,' and indicate that courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of 'the whole record.'
>
> • • •
>
> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.
>
> "This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment."

In an annotation following this case in the L. ed. report at 95 L. ed. 473, the author comments on the scope of review under the Administrative Procedure Act as follows:

> "Section 10 (e) of the Administrative Procedure Act requires a reviewing court to set aside administrative action 'unsupported by substantial evidence' and, in making such determination, to review 'the whole record.' It is now settled that #10 (e) broadened the scope of judicial review as compared with the standards prevailing prior to the enactment of the act. Under this provision a reviewing court, in determining whether an administrative decision is supported by substantial evidence, must take into account whatever in the record fairly detracts from the weight of the evidence, and cannot uphold a decision merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn."

The wisdom of enlarging the scope of Judicial Review is apparent in a case such as the one now before the court. Here the petitioner is charged with intentionally manipulating his scales in weighing cattle sold to his customers in order to cheat the customers. This, if true, is a matter that involves moral turpitude in the operation of his business. A conviction of such an offense will seriously affect his business and his ability to make a living for himself and his family.

The charge made against him is made by the employees of an Administrative Agency of the Federal Government. These same employees are the ones who conducted the investigation. Their natural tendency would be to want to justify their investigation by obtaining a finding that the person investigated was guilty.

The tribunal that decides the guilt or innocence of the accused is the same one that made the investigation and that filed the Complaint. While we do not say that the Hearing Officer, or the Judicial Officer for the Secretary of Agriculture acted in bad faith, we do say that it is only natural for employees of the Department of Agriculture to make every effort to sustain the actions and investigations of other members of the department. Evidence presented by their fellow workers is given great weight, while other evidence presented by the person accused is looked upon with great suspicion. This is the natural tendency when one department of the government is charged with all of the functions and duties of investigator, prosecutor and judge. The first opportunity under the law that the petitioner, Joseph L. Mitchell, has been entitled to have his case reviewed by a court is now before the United States Court of Appeals.

We respectfully contend that the evidence in this record is not sufficient to justify the decision of the Secretary of Agriculture that Joseph L. Mitchell falsely and intentionally misweighed the cattle in question.

Mr. Gilbert H. Hopper, Supervisor of the Chicago office of the Department of Agriculture, made arrangements with Fred Bend, Sr. and his two sons to purchase cattle on three occasions from the Joseph L. Mitchell Sale Barn in LaSalle County, September 28th, October 12th and October 13th, 1960 (P.A. 13, 18). Twenty head of cattle were purchased on each occasion. They were weighed at the Mitchell place of business and then hauled a distance of 11 to 16 miles, depending on the route taken, and reweighed from three quarters of an hour to an hour and a half later. 20 head of cattle purchased on September 28th weighed 520 pounds less on the second weighing which was a loss

of 3.35% of their weight. The second group of cattle weighed 835 pounds less on the second weighing, or 5.56% loss of weight. The third group of cattle purchased on October 13th weighed 780 pounds less on the second weighing or 5.59% loss of weight (P.A. 165).

Joseph L. Mitchell testified that he honestly and correctly weighed the cattle on each of these three occasions and did not in any way attempt to manipulate the scales (P.A. 78). He explains the difference in weight as shrinkage of the cattle. The question in this case is not what a group of 20 cattle would normally shrink in being hauled a distance of 14 or 15 miles. The question is whether it is reasonably possible that these cattle could have shrunk by these amounts on the occasions in question.

Fred Bend went to Mr. Mitchell's place of business on several occasions wanting to buy cattle. On one occasion Mitchell had a group of cattle enroute from the West. Fred Bend told him he wanted to buy on scale weights and not on Western Weights (P.A. 77). Mr. Mitchell told Fred Bend that the cattle would not be ready for delivery for 36 to 48 hours after they arrived. Mr. Bend agreed to this (P.A. 77). Mr. Bend testified that Mr. Mitchell told him expressly that he was going to put as much fill back on the cattle as possible. Fred Bend understood that the time of delivery was postponed so Mitchell would have time to put weight back on the cattle (P.A. 33-35). The September 28th cattle had been purchased in Drummond, Montana. The October 12th and October 13th cattle were purchased by Mr. Mitchell from Geyser, Montana (P.A. 76, 79). This is what is known as long grass country (P.A. 100). After the cattle arrived they were given hay for about 8 hours and then 1 drink of water. Thereafter they were given hay for about 36 hours and on the morning of the

sale they were given all of the water they wanted to drink for about 3 or 4 hours (P.A. 77). The cattle shrank about 10% of their weight on the trip from the West (P.A. 76). By the fill procedure approximately 60 pounds per head of this loss was put back on the cattle by the time of weighing.

At the time the cattle were weighed, Mr. Mitchell invited Mr. Bend to see them weighed (P.A. 78). Mr. Mitchell did not know at that time that Mr. Bend, or any of the other gentlemen, had any connection with the Department of Agriculture. Mr. Mitchell's scale was so located that anyone familiar with weighing operations could stand to the rear of the scale, a distance of 30 feet away, where Mr. Mitchell would not see him, and could observe the weighing and tell whether the scale was out of balance or whether there was any manipulation of any kind in the weighing operation (P.A. 63-66).

Mr. R. L. Hahnert, United States Government Scale and Weight expert took part in this investigation. He had been assigned to ride on the truck with Mr. Brinckmeyer, Department of Agriculture's employee, and assist him in transporting the livestock and the reweighing of the livestock and the actual record keeping (P.A. 56). He was present on the three occasions, September 28th, October 12th and October 13th. He purposely did not watch the weighing of the cattle because he was instructed by his superior not to do so (P.A. 63). He testified that there was no attempt on the part of Mr. Mitchell to prevent him or anyone else from observing the weighing of the cattle. It would have been perfectly easy for him as a scale expert to watch the weighing operation and determine whether the scale was placed in balance. In fact he could have gotten at a point as far as 30 feet away from the scale

to the rear of Mr. Mitchell and observed the weighing operation. He could have told from there whether the scale was or was not in balance (P.A. 63-66).

On his direct examination Mr. Hahnert was asked whether the difference in weights could have been caused by the scale being out of balance. Objection was made to this question on the ground that it was speculative (P.A. 61). After the objection was overruled the witness testified that in his opinion the difference could have been caused by the scale being out of balance (P.A. 64). On cross examination the witness admitted that this answer was purely speculative and that he would have no way of knowing whether the scale was in balance or out of balance on the first weighing (P.A. 69). The witness testified that in addition to Mr. Mitchell intentionally putting the scale out of balance, it would be possible to intentionally weigh the cattle erroneously by pushing the poise out and taking a print (P.A. 70). He stated that he could have observed this operation, if it had taken place from a distance of 30 feet away to the rear of Mr. Mitchell and could have easily ascertained that the cattle were being weighed falsely (P.A. 69-70). He stated that it would be very foolish for a person standing in plain view, as Mr. Mitchell was, to manipulate the scales or juggle the balances (P.A. 70). Any ordinary purchaser of livestock familiar with the weighing operation could easily have detected any manual manipulation of the scale or placing it out of balance (P.A. 64).

Mr. Hahnert also testified that another way that it would have been very easy to determine whether the cattle were properly weighed was to direct Mr. Mitchell to put them right back on the scale immediately after the weighing

before they were loaded into the truck. Although he knew the difference in weights on the occasion of September 28th, he did not direct this to be done on the second occasion, October 12th. Likewise, having knowledge of the difference of weights on September 28th and October 12th he did not direct Mr. Mitchell to put the livestock back on the scale and reweigh them on October 13th (P.A. 65).

Fred Bend, Sr. testified that when Mr. Mitchell invited him down to the scale to observe the weighing operation, Mitchell did not know that he had any connection with the Department of Agriculture, or was in any way checking up on him (P.A. 37). Mr. Bend did not think that Mr. Mitchell intended to pull any tricks in the weighing operation or to misweigh the cattle (P.A. 37).

Jack W. Brinckmeyer is employed as a marketing expert by the Department of Agriculture and he took part in this investigation on behalf of the Department. He acted as the truck driver to haul the livestock. He testified that in his opinion by the use of the quick fill method it would not be unreasonable to expect 56 to 60 pounds of weight to be put on cattle. Finally, he did not think that they would lose this amount of weight as quick as these cattle did. Still, he testified that conditions and things being right, it would not be impossible for them to do so (P.A. 55).

Howard E. Wyman was a witness called on behalf of the Department of Agriculture. He is an employee of Henry Steele & Company who operate a sale barn at Montgomery, Illinois. He testified that each steer is different as to the amount of weight that can be put on it by the quick fill method, and the amount of weight it will lose. His testimony was, "every steer is different from the next steer. Million steers—Million cases." (P.A. 108, 109).

Circular Number 221 on "Shrinkage of Cattle" prepared by the Montana Agricultural Experiment Station, Montana State College, in cooperation with the United States Department of Agriculture states as follows:

> "One thing can be shown with the most certainty—there is great variability in shrink among animals. Every animal responds differently to each situation. Experiment station fat steers, with similar breeding and care when shipped about 700 miles and allowed time for refill, have shrinkage ranging from zero to 10 per cent.
>
> • • • •
>
> There isn't much difference in shrink between trucking and shipping by rail. Livestock trailed over 4 miles, or over 15 miles even if feed and water are available on the trail, shrink considerably more than if they are moved by truck or train. Cattle moved by rail shrink slightly more than those moved by truck for short hauls but less on longer hauls.
>
> Unusually high temperatures increase shrinkage. But cold weather has little effect on shrink unless accompanied by other adverse weather conditions.
>
> Feeder cattle shrink about one-quarter more than fat cattle on long hauls. But net shrink—weight after fill back—shows little difference. During the first 9 hours in transit, fat cattle shrink more than feeder cattle. Beyond 9 hours the shrinkage for feeder cattle is greater." (P.A. 145-146)

In circular Number 220 entitled "Shrinkage is important" published in April 1959 by the Montana Agricultural Experiment Station, Montana College in cooperation with the United States Department of Agriculture, Table 3 on page 9 shows the prices necessary to equal net returns for an 800 pound beef animal under all tentative market conditions. It compares shipping to a central market a distance of from 600 to 1000 miles with hauling to a local auction. The table is as follows:

Sales Channel	Time of Sale	Shrink Conditions	Distance to market	Cash costs	Price per cwt. to yield equal net returns.
		%		dols.	dols.
Central market	On arrival	10	1,000	10.87	23.75
		9	800	9.39	23.25
		8	600	8.75	22.90
	1 day after	6	1,000	11.52	22.80
	arrival	5.5	800	10.04	22.50
		5	600	9.40	22.30
	3 days after	4	1,000	13.22	22.55
	arrival	3.5	800	11.74	22.25
		3	600	11.10	22.05
Local Auction	On arrival	5	100	5.86	21.80
		4	50	4.47	21.40
		3	25	3.79	21.10

(P.A. 147)

The important thing about this table is the typical shrinkage conditions quoted therein which it is stated were found by the Experiment Station Research to be somewhat typical. It is to be noted that on a haul of 100 miles to a local auction with sale immediately on arrival 5% shrink is to be expected. On a haul 50 miles with sale upon arrival at the local auction a 4% shrink is expected. On a haul of 25 miles to the local auction with sale on arrival 3% shrink is expected. On page 10 of the pamphlet shrink is commented upon as follows:

> "The shrinkage used in this example and in Table 3 are approximations that are somewhat typical. However, the variability of shrinkage among areas, type of cattle, kind of feed, and methods of handling, is so great and unpredictable that you need records on your own cattle under your own marketing conditions before you can estimate shrinkage as accurately as you

must. Experiences of others help give you an idea of what to expect.

Tricks in the Trade

Did you ever pass up a free meal? Here's one you can't afford to accept—the free meal your buyer offers after your cattle are delivered but before they are weighed. *A few buyers stall for time before weighing your cattle.* It's an old trick but the free meal he buys is paid for many times by the shrink that takes place while you enjoy an expensive meal." (P.A. 147)

The Judicial Officer for the Secretary of Agriculture took official notice of these pamphlets in making his decision (P.A. 167).

In these experiments conducted by the Montana Agricultural Experiment Station in cooperation with the United States Department of Agriculture, it is found that when cattle are hauled from a ranch a distance of 25 miles to a local auction and sold on arrival 3% shrink is expected. This is a case where normal beef animals are taken right from the ranch under normal conditions. It is pointed out, however, that there is a great variability of shrinkage among the various types of cattle, kind of feed and methods of handling so that it makes the actual shrinkage practically unpredictable. In our case we have the additional factor that the cattle involved were purposely filled with water by what is known as the quick fill method with the knowledge and consent of the purchaser for the purpose of increasing their weight.

The Hearing Examiner and the Judicial Officer in making their decisions both commented upon the fact that there was not an excessive amount of urine or droppage in the truck after the cattle were hauled to the marketing

association to be reweighed. The unreliability of this evidence is apparent. Frank W. Peterson, a Department of Agriculture employee, and a witness for the Department of Agriculture was asked to describe the condition of the truck. He stated "We went in the truck and looked and naturally there would be some droppings and some urine in there, but I don't think to excess." Objection was made to the statement that he did not think it was to excess on the ground that it was a conclusion of the witness and infringed on the duty of the Hearing Examiner. Hearing Examiner Rogers stated "I do not know how to determine if excessive or not". This comment is significant in that it is impossible for anyone to determine whether it is excessive or not. This is clearly a conclusion of the witness. Nevertheless, the Hearing Examiner overruled the objection and permitted the evidence in the record (P.A. 25, 26).

The Department of Agriculture employee, Jack W. Brinckmeyer, also gave his opinion that there was no excessive urine or droppings in the truck. He was asked on cross-examination what he did to determine whether there was an excessive amount of urine on the floor. His answer was that he walked through the truck and his opinion was based on how dirty his shoes got (P.A. 52, 53). He did not know whether the truck was water-tight, or whether urine would leak out of it (P.A. 53). We cite this as the type of unreliable evidence on which the decision of the Secretary of Agriculture is based.

We contend that the decision of the Department of Agriculture that the petitioner, Joseph L. Mitchell, falsely and intentionally misweighed the cattle on the occasions of the three sales in question is not supported by substantial evi-

dence considering the whole record. This conclusion is borne out by the following matters shown in the record:

1. The opinions of eight reliable and experienced witnesses testified on behalf of Joseph L. Mitchell that the differences in weights could be explained by shrinkage.

2. The actual instances and experiences cited and testified to by these witnesses of shrinkage of cattle on which their opinions are based.

3. The conclusions set forth in the pamphlet published by the Montana Agricultural Experiment Station in cooperation with the United S ates Department of Agriculture that the variability of shrinkage of cattle among areas, type of cattle, kind of feed, and methods of handling is great and unpredictable. Normal shrink in hauling 25 miles was 3% in cattle not filled by the quick fill method.

4. The fact that Mr. Mitchell weighed the cattle in full view where he could easily be watched and could easily be seen if he made any attempt to misweigh the cattle.

5. The fact that the weight and scales expert of the Department of Agriculture, Mr. Hahnert, did not watch the weighing operation, although he could have done so, from a place where he could not be observed by Mr. Mitchell.

6. The fact that the Department of Agriculture did not demand an immediate reweighing of the cattle and checking of the scales, although it could have done so and this would have conclusively established whether or not the weights were correct.

We respectfully submit that the decision of the Court of Appeals and of the Secretary of Agriculture should be set aside as unsupported by substantial evidence in this case.

II.

The Hearing Officer erred in admitting evidence, tests and experiments of hauling other cattle on other occasions to determine how much weight they would lose when the conditions and circumstances under which the tests were conducted were not similar to the circumstances prevailing at the time of the occurrence.

(a) Evidence of tests, or experiments, are not admissible unless it is proved that the circumstances under which tests are performed are similar to circumstances prevailing at the time of the occurrence.

The Department of Agriculture offered in evidence the results of various tests that they made after the purchases from Mr. Mitchell for the purpose of attempting to determine how much the cattle would shrink. On September 29th, 1960 they purchased 20 head of cattle from Henry Steele & Company of Montgomery, Illinois. The cattle weighed 14,725 pounds at the time of weighing. They were hauled 8 miles in 30 minutes and were then reweighed. They lost 125 pounds, or .98% of their weight. These cattle were hauled an additional 30 miles and the loss of weight was 350 pounds, or 2.37%, of their weight (P.A. 153).

On October 5th the Department of Agriculture purchased from Western Cattle Company of Mendota, Illinois, 20 steers weighing 14,640 pounds. They hauled them 20 miles and reweighed them and the loss of weight was 100 pounds, or .68%.

On November 20th, 1960 the Department of Agriculture purchased from Henry Steele & Company of Montgomery, Illinois 20 steers weighing 14,445 pounds. They hauled the steers a distance of 16 miles and reweighed them an hour

and a quarter later. They lost 180 pounds or 1.24%. On November 20th, 1960 the Department of Agriculture purchased 20 steers from Henry Steele & Company weighing 13,925 pounds and hauled these steers 11 miles in three quarters of an hour. The steers lost 95 pounds, or .68% of their weight. On December 6th, 1960 the Department of Agriculture purchased 20 steers from Western Cattle Company of Mendota, Illinois weighing 12,670 pounds. They hauled them 11.2 miles in 33 minutes. The cattle lost 40 pounds or .32% of their weight. On December 9th, 1960 the Department of Agriculture purchased 20 steers from Chicago Producers Commission Association, Montgomery, Illinois weighing 13,980 pounds. They hauled them 11.2 miles in 51 minutes. The steers lost 50 pounds, or .35% of their weight (P.A. 154).

Petitioner, Joseph L. Mitchell, objected to all these tests and to the admission of evidence concerning them. His objection was as follows:

> "Mr. Berry: We have an objection to some of those. Now let me pick out the ones we object to and I will state the reason. Exhibits 12, 12a, 13 and 14. Those and 14a we object to which are the exhibits pertaining to the Steele transaction. Also exhibits 15 to Steele. We object to that and object to exhibit 16. We object to that. That's the Steele transaction. Exhibit 17, the Western Cattle Company transaction, we object to. Exhibit 18 we object to. That's the Western Cattle Company transaction. Exhibit 18 is a Western Cattle Company transaction. We object to that. Exhibit 18b is a Western Cattle Company transaction. We object to that.
>
> "We object to all of them because there isn't sufficient identification and for the further reason Government Witness Brinckmeyer testified that these transactions must be treated on individual basis. That they can be much different depending on the circumstances

and depending particularly on the man that did this filling.

"We object on the ground that there is no proper foundation laid for these exhibits. No showing of similarity of cattle between Western Cattle Company and Steele Company. In fact it appears from the evidence that this first cattle was of different origin. Second the cattle were not given the same type of water fill. Third, the condition of the cattle on arrival to the local yards and extent of shrink in transfer is not shown. Fourth, the type of hay fed to the cattle is not shown. Fifth, no order authorizing the dealer to fill the cattle was shown as far as Steele and Western Cattle Company is concerned as was shown here for Mitchell. Sixth, the period of fill is not of the same duration in the two instances. Seven, temperament of the cattle and the shock of the transit is unknown. Eighth, the cattle and the temperature is not comparable or proven. And, in view of all of these facts, the proof is insufficient to entitle these exhibits to be admitted in evidence."

(P. A. 73, 74). The objection was overruled by the Hearing Examiner and the exhibits were admitted in evidence.

The Hearing Examiner and the Judicial Officer for the Secretary of Agriculture gave great weight to these tests. They have each quoted at length from them in their findings and decision. The Court of Appeals did not rule on their admissibility. We submit that they should not have been admitted in evidence.

Evidence of tests, or experiments, are not admissible unless it is proved that the circumstances under which the tests are performed are practically identical to the circumstances prevailing at the time of the occurrence. In 32 C.J.S. "Evidence", Sec. 590 p. 442, it is stated:

"Where a party alleges that a certain result did or did not follow from certain conditions, it is permissi-

ble for him, in support of the assertion, to introduce evidence of experiments made under substantially similar conditions, but in order that an experiment shall possess sufficient probative value to warrant the admission of evidence thereof, it is necessary that the circumstances under which the experiment is made shall have been similar to the circumstances prevailing at the time of the occurrence involved in the controversy, especially if the conditions were more favorable to the party offering the evidence."

In the case of *New York Life Insurance Company* v. *Alman*, 22 Fed. 2d 98, an action was brought on a life insurance policy on which the question of suicide was an issue, the insured having been killed by a shotgun. It was there held that evidence of experiments made by firing a gun against cardboard, and a box, should not be admitted in evidence. The court states as follows:

"In the event of another trial of this case, the evidence of the experiment made with the cardboard and the box, as well as the exhibits themselves, should not be admitted in evidence. Experiments, to be admissible in evidence, must be made under conditions practically identical with the conditions that they purport to illustrate."

In the case of *Thomas* v. *Buchanan*, 277 Ill. App. 393, in an automobile accident case, evidence was offered that a witness drove past the scene of the accident on the day following the collision and saw certain objects in the road. It was contended that this evidence was inadmissible as experimental evidence. The court states the rule as follows:

"Defendant argues that this was experimental evidence and incompetent. The rule is that such evidence is competent where the circumstances under which the experiment took place are very similar to those obtaining at the time of the accident."

In *Watson Orchards Inc.* v. *the New York, Chicago and St. Louis Railroad Company*, 250 Ill. App. 22, an action was brought against the railroad company for the destruction of a storage plant by fire alleged to have been started by sparks from a locomotive coming into contact with granulated cork in a building. It was held that evidence of a mechanical engineer of an experiment to effect a demonstration that granulated cork could not burn, and that sparks from a locomotive could not have caused the fire and that he could demonstrate to the jury whether cork could burn, was inadmissible where there was no evidence that the coal, the cork, and the conditions in the experiment were the same as prevailing at the time of the fire. The court states at pages 34 and 35:

> "These and various other experiments were testified to by the same witness, without any testimony showing that the same kind of coal was used that appellee used in its engines, or that the cork and conditions were the same as prevailed in appellant's storage house on the night of the fire in question. There are other conditions that may or may not have entered into the question of the probability or possibility of the origin of the fire charged in the declaration, in a certain manner not shown by the evidence, such as the nature of the particular coal used from which the spark was emitted, the humidity of the atmosphere and its effect upon granulated cork and other conditions, so that it can not be said that the experiments were made under the same identical conditions as existed at appellant's plant on the night in question.
>
> * * *
>
> "Appellee apparently undertook an experiment to effect a demonstration that granulated cork could not burn, and that sparks from appellee's locomotive could not have caused the fire. It was an attempt to cover the entire physical and chemical field as pertained to

> this fire, and brings the testimony within that class condemned in *Libby, McNeil & Libby* v. *Scherman*, 146 Ill. 540, and *Chicago City Ry. Co.* v. *Brecher*, 112 Ill. App. 106, 107."

In the case of *Johnson* v. *Gustafson*, 233 Ill. App. 216, in an action against the owner of an automobile which collided with plaintiff's vehicle in the nighttime when he had only his dimmer lights burning, a question asked by plaintiff's attorney, as to what distance the roadway would have been illuminated had the bright lights been burning was held to be properly excluded where it was not confined to the place in question or to the night, or a similar night to the one in question. The court states at page 228:

> "Complaint is also made by the plaintiff of the ruling of the court in refusing to admit evidence of experiments made shortly after the accident and under substantially similar conditions. The ruling of the court was not improper, as the questions did not tend to show that the experiment was made under substantially similar conditions to those that prevailed at the time of the accident."

(b) The burden is on the one offering evidence of tests or experiments to prove that the circumstances are the same as those prevailing at the time of the occurrence.

It is clear from the authorities that evidence of experiments, or tests, are not admissible unless it is shown that the conditions under which the test is conducted are substantially identical to the conditions of the occurrence with which it is being compared. The burden is on the person offering the evidence to show that the conditions are the same 32 C.J.S. "Evidence" Sec. 590 page 443. In the case now before the court there was no showing that the con-

ditions were the same. In fact, the tests were conducted under circumstances completely different. These differences may be enumerated as follows:

1. The cattle sold by Mr. Mitchell were sold on the express terms that Mr. Mitchell keep them for 36 to 48 hours after they arrived from the West for the express purpose of placing as much fill in them as possible. This was not proved of any of the tests conducted.

2. The temperature varied greatly at the time of the tests from the time of the sales in question. The temperature was from 80 to 81 degrees above Farenheit on October 13 and 13 (P.A. 86). At the time of the tests in November and December the temperature ranged from 20 degrees above to 50 degrees above (P.A. 105). Even Gilbert L. Hopper, the Department of Agriculture representative in charge of the investigation, admits that temperature would make a great difference as to the amount of shrinkage of cattle (P.A. 106).

3. The temperament of the cattle has a great deal to do with the amount of fill they will take and with the amount they will shrink. There is no showing that the temperament of the cattle used in the tests was the same as those sold by Mr. Mitchell.

4. The length of time that the cattle are in the yards after arrival from the West has a decided effect on the amount they will shrink. If they are quick filled in 36 to 48 hours they will shrink much more than if they are in the yards on grain and hay for a couple of weeks. The cattle sold by Mr. Mitchell were in from the West about 36 to 48 hours. Some of the cattle used in the tests were in the yards feeding on grain and hay for 2 weeks before the tests were conducted (P.A. 110).

5. Whether the cattle are from what is known as the long grass country in the West or what is known as the short grass country in the West has a great deal to do with the amount of fill that can be put on them and the amount they will shrink. (P.A. 100). The cattle sold by Mr. Mitchell were from the long grass country (P.A. 100). The representatives of the Department of Agriculture did not know whether the cattle used in the tests were from the long grass country or the short grass country (P.A. 105).

6. Every steer is different and will shrink a different amount. As Government Witness Wyman testified, "You have a million steers—you have a million different cases". (P.A. 109). As stated by Montana State College Circular Number 221, prepared in cooperation with the United States Department of Agriculture, there is a great variability in shrink among animals. Every animal responds differently to a situation (P.A. 145).

The evidence in this case did not qualify these tests as being sufficiently reliable to be admitted in evidence. The conditions were not shown to be the same. The conditions were shown to be different in many important particulars. It is apparent from the statement and decision of the Hearing Examiner, and the Judicial Officer for the Secretary of Agriculture, that they both gave these tests great consideration in making their decisions. We submit that this erroneous and improper evidence is sufficient to require that the decision of the Secretary of Agriculture finding Joseph L. Mitchell guilty of falsely weighing these cattle be set aside.

CONCLUSION.

We respectfully submit that the public interest will be promoted by prompt settlement in this court of the questions involved herein. Administrative Hearings are becoming ever more important insofar as the rights of individuals are concerned. In this case the petitioner's right to conduct his business and make his livelihood are involved. It is important that he should not be deprived of this right without receiving a fair Hearing, and on the basis of legal evidence. We respectfully submit that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ANDREW J. O'CONOR
Attorney for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 13658 SEPTEMBER TERM, 1962—SEPTEMBER SESSION, 1962

JOSEPH L. MITCHELL, d/b/a LA-SALLE COUNTY LIVESTOCK MARKETING CENTER,
Petitioner,
v.
ORVILLE L. FREEMAN, Secretary of Agriculture,
Respondent.

Petition to Set Aside an Order of the Secretary of Agriculture Under the Packers and Stockyards Act.

October 22, 1962.

Before CASTLE, KILEY and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* Petitioner seeks a review of the order of the Judicial Officer of the United States Department of Agriculture acting for the Secretary of Agriculture wherein the Judicial Officer ordered petitioner to cease and desist from "(1) falsely and incorrectly weighing livestock sold in commerce, (2) using a false or incorrect scale ticket or invoice as a basis of settlement for livestock sold in commerce, (3) collecting for livestock sold in commerce on the basis of false and incorrect weights, and (4) causing false and incorrect entries in his accounts, records, and memoranda subject to the act". Further, it was ordered by the Judicial Officer that the petitioner "shall keep accounts,

records, and memoranda which correctly disclose the weighing of livestock in his business subject to the act". The Judicial Officer also suspended the petitioner as a registrant under the Act for a period of 90 days.

The petitioner, Joseph L. Mitchell, doing business as the LaSalle County Livestock Marketing Center, of LaSalle County, Illinois, is a posted stockyard for regulatory purposes under the Packers and Stockyards Act as amended. The stockyard is owned by Joseph L. Mitchell. Joseph L. Mitchell is also registered as a "market agency" under the Packers and Stockyards Act, to buy and sell livestock on a commission basis. He is also registered under the Act as a "dealer" to buy and sell livestock for his own account.

The complaint of the Director, Packers and Stockyards Division, Agricultural Marketing Service filed with the United States Department of Agriculture on December 22, 1960 alleged that petitioner sold cattle on three occasions at his stockyards in LaSalle County on September 28, 1960, October 12, 1960 and October 13, 1960, and in making said sales he weighed the cattle at more than their true and correct weights and issued scale tickets and invoices showing weights greater than the true and correct weights of said cattle, and charged and collected for the cattle on the basis of such false and incorrect weights. However, in this proceeding we are only concerned with the charges of October 12, 1960 and October 13, 1960, as the Judicial Officer dismissed the one of September 28, 1960.

On October 12, 1960 twenty head of cattle were weighed by petitioner and were then transported a short distance and within forty-two minutes were weighed on another scale. The second weighing showed that the cattle were 835 pounds lighter than by the first weighing. On October 13, 1960 twenty head of cattle were weighed by petitioner and forty minutes later weighed by respondent. These cattle were found to be 780 pounds lighter than the first

weighing. In both instances the petitioner on the first weighing stamped the weights on the stockyard weight tickets. There was testimony that before the second weighings the scales used in each instance had been properly tested and found accurate. It is not controverted that the reweighing of each lot of cattle was by an experienced and qualified specialist in the field of scales and weights.

The petitioner contends that the shortage in weights was caused by shrinkage. There was considerable testimony by cattle feeders and buyers pro and con as to whether it could be attributed to shrinkage. One of the witnesses for the respondent was Jewell Schlapp, a Veterinarian, a graduate of the University of Illinois, who testified that he rendered professional services to livestock dealers and feeders in the Yorkville, Illinois area. He testified that in his opinion in the case of twenty steers in the 700 and 800 pound class hauled a distance of eleven to fourteen miles, as in the instant case, it would be improbable that they would lose as much as 520 pounds. There was testimony as to livestock hauling tests which showed that such a loss of weight as was here involved would not occur through shrinkage. Petitioner contends that this testimony was inadmissible. However, apart from this testimony there is ample evidence to support the Judicial Officer's findings and conclusions.

It is our view, and we so hold, that on the record as a whole substantial evidence supports the findings and that such findings are sufficient to support the order issued. The order of the Judicial Officer acting for the Department of Agriculture is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago 10, Illinois
Monday, October 22, 1963

Before

Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

JOSEPH L. MITCHELL, d/b/a LA-SALLE COUNTY LIVESTOCK MARKETING CENTER, *Petitioner,* vs. ORVILLE L. FREEMAN, Secretary of Agriculture, *Respondent.*	Petition to Set Aside an Order of the Secretary of Agriculture.

No. 13658

This cause came on to be heard on the petition to review and set aside an order of the Secretary of Agriculture and the transcript of the record from the Department of Agriculture, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Secretary of Agriculture entered in this cause on February 13, 1962, be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:
Kenneth J. Carrick

Clerk of the United States Court of
Appeals for the Seventh Circuit.
(Seal)

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

JOSEPH L. MITCHELL, ETC.,

Petitioner,

vs.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including January 20, 1963—all on the assumption—without deciding—authority to so enlarge the time is present.

/S/ Tom C. Clark
Associate Justice of the Supreme Court of the United States.

Dated this 18th
day of December, 1962

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CITATIONS

Statutes and Regulations:	
The Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C. 41 *et seq.*, Section 10, 15 U.S.C. 50	3
The Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 181, *et seq.*:	
Section 312(a), 7 U.S.C. 213(a)	2, 6
Section 401, 7 U.S.C. 221	2, 6
Section 402, 7 U.S.C. 222	3, 6
Department of Agriculture Regulations promulgated under the Packers and Stockyards Act:	
9 C.F.R. 201.55	4
9 C.F.R. 201.71	4

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 755

JOSEPH L. MITCHELL, D/B/A LA SALLE COUNTY LIVESTOCK MARKETING CENTER, PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1-3)[1] is reported at 308 F. 2d 855.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1962 (Pet. App. 4). The petition for a writ of certiorari was filed on January 18, 1963.

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[1] "Pet. App." refers to the appendix to the petition for certiorari filed in this Court. "Pet." refers to that petition. "P.A." refers to the printed appendix attached to petitioner's brief in the court of appeals.

The jurisdiction of this Court is invoked under 7 U.S.C. 194(h) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the findings of the Judicial Officer of the Department of Agriculture were supported by substantial evidence.

2. Whether the hearing examiner erred in admitting evidence relating to certain tests involving the loss of weight by livestock through hauling.

STATUTES AND REGULATIONS INVOLVED

1. The Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 181 *et seq.*, provides in pertinent part:

> SEC. 312. [7 U.S.C. 213(a)](a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.
>
> * * * * *
>
> SEC. 401. [7 U.S.C. 221] Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, * * * Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business,

the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept * * *.

SEC. 402. [7 U.S.C. 222] For the efficient execution of the provisions of this Act, * * * the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act * * *.

The Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C. 41 *et seq.*, provides in pertinent part:

SEC. 10. [15 U.S.C. 50] * * * Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made * * * or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum * * * or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, * * * shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

* * * * * *

2. Department of Agriculture Regulations promulgated under the Packers and Stockyards Act, provide in pertinent part:

9 C.F.R. 201.55

> When livestock or live poultry is bought or sold on a weight basis in transactions subject to the provisions of the act, settlement therefor shall be on the basis of the weight shown on the scale ticket or correction ticket, as the case may be. Any weight figures shown on accounts of sale, accounts of purchase, invoices, bills, or statements issued in connection with transactions subject to the act shall be actual weights obtained on stockyard scales, in the case of livestock, or on scales operated by licensees, in the case of live poultry, at the place and at the time of the consummation of the transactions in question or, if not, shall be appropriately explained on the accountings, bills, or statements issued.

9 C.F.R. 201.71

> Each stockyard owner, market agency, or licensee who weighs livestock at a posted stockyard or live poultry in a designated area shall install, maintain, and operate the scales used for such weighing so as to insure accurate weights.

STATEMENT

Petitioner seeks review of a decision of the court of appeals upholding a determination by the Judicial Officer of the Department of Agriculture that petitioner violated the Packers and Stockyards Act by falsely weighing cattle at his stockyard. Petitioner does business as the La Salle County Livestock Mar-

keting Center, a stockyard regulated under the Act. As such, he was registered with the Secretary of Agriculture both as a "market agency" and as a "dealer." (P.A. 1.)

At a lengthy hearing before a hearing examiner, evidence was introduced that on October 12, 1960, twenty head of cattle were weighed by petitioner and sold by him to purchasers acting for the Department of Agriculture. The cattle were then transported eleven miles by truck, were weighed 42 minutes after the first weighing, and were 835 pounds lighter than at the first weighing (P.A. 165). On October 13, 1960, another twenty head of cattle were weighed and sold by petitioner to the same purchasers. They were similarly transported and weighed some forty minutes later by officials of the Department of Agriculture, and were 780 pounds lighter than at the first weighing (P.A. 165). In both instances petitioner stamped the incorrect heavier weights on the stockyard weight tickets (P.A. 78–79). On each occasion prior to the reweighing by a qualified official of the Department of Agriculture, the scales to be used were tested and found to be accurate (P.A. 55–62).

Petitioner contended before the hearing examiner that the shortages were the result of shrinkage (P.A. 84). Several cattle feeders and buyers, testifying on behalf of the petitioner, stated that the shortage in weight could be attributed to shrinkage (P.A. 92, 94, 96). Several witnesses for the Department of Agriculture testified to the contrary (P.A. 48–50, 107, 110). For example, Dr. Jewell Schlapp, a veterinarian, testified that in his opinion, where twenty steers in the 700

and 800-pound class were hauled a short distance, as in the present case, it was improbable that they would lose as much as 520 pounds (P.A. 114). Over petitioner's objection the hearing examiner admitted into evidence certain testimony relating to livestock hauling tests which showed that such weight loss would not occur through shrinkage (P.A. 73–75).

The hearing examiner found that the weights recorded by petitioner were false and incorrect, and that the recording of said weights and the collection of commissions for the cattle sold constituted unfair and deceptive practices in wilful violation of sections 312(a), 401, and 402 (P.A. 157–158) of the Act. The Judicial Officer of the Department of Agriculture reviewed the evidence and affirmed the foregoing findings of violation.[2] He suspended for 90 days petitioner's registration as a market agency and a dealer, ordered him to cease and desist from the violations found, and directed him to keep records correctly showing the weighing of livestock (P.A. 174–175).

The court of appeals unanimously affirmed. It held (Pet. App. 3) that "on the record as a whole substantial evidence supports the findings and that such findings are sufficient to support the order * * *."

ARGUMENT

Petitioner contends (1) that there was not substantial evidence to support the findings that he falsely

[2] The Judicial Officer disapproved the examiner's finding that petitioner had also engaged in false weighing in connection with a sale of cattle on September 28, 1960 (P.A. 173).

weighed the cattle (Pet. 17–30), and (2) that the trial examiner erroneously admitted evidence of certain tests relating to loss of weight through shrinkage incurred by cattle during transportation (Pet. 31–38). These contentions are without merit, and neither presents a question warranting further review.

1. Petitioner presents a detailed summary of the evidence supporting his claim that the loss in weight of the cattle was due to shrinkage (Pet. 11–14, 29–30). As the court of appeals recognized (Pet. App. 3), however, "[t]here was considerable testimony by cattle feeders and buyers pro and con as to whether it could be attributed to shrinkage." The evidence that the loss in weight was not due to shrinkage—and hence that it reflected false weighing by petitioner—included: testimony by Dr. Schlapp on the subject of shrinkage (P.A. 112–116); research publications dealing with the intransit shrinkage of cattle (P.A. 146–147, 167 fn. 1); testimony by persons who purchased the cattle from petitioner (P.A. 29–32, 39–40), by employees of the Department of Agriculture (P.A. 17, 19, 25, 48–50), and by cattle feeders and buyers (P.A. 32, 39, 118–119); and data gathered from tests conducted by Department of Agriculture officials (P.A. 101–105, 141–143). The evaluation of the conflicting evidence was for the Judicial Officer, and there was plainly substantial support in the record

[3] Although petitioner states (Pet. 17) that the court of appeals applied the rule that it would affirm if there was "any" evidence in the record to support the findings, the court expressly held (Pet. App. 3) that "on the record as a whole substantial evidence supports the findings * * *."

for his conclusion that the shortage in weight was due to petitioner's false weighing rather than to shrinkage. In any event, there is no occasion for further review of this factual issue.

2. Petitioner's argument that the testimony relating to the tests should not have been admitted because the tests were not made under the same conditions as those in the present case is irrelevant. For the court of appeals held (Pet. App. 3) that "apart from this testimony there is ample evidence to support the Judicial Officer's findings and conclusions." Furthermore, the significance of the distinctions between the circumstances surrounding the tests and those in the present case necessarily turns on the particular facts of this case, and goes to the weight rather than to the admissibility of the evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Acting Assistant Attorney General.

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LAWRENCE R. SCHNEIDER,
Attorneys.

FEBRUARY 1963.

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